

APPEALS JUDGEMENT SUMMARY FOR ANTE GOTOVINA AND MLADEN MARKAČ

The Hague, 16 November 2012

Please find below the summary of the Judgement read out today by Judge Meron¹.

As the Registrar announced, the case on our agenda today is Prosecutor v. Ante Gotovina and Mladen Markač. In accordance with the Scheduling Order issued on 2 November 2012, today the Appeals Chamber will deliver its judgement.

Following the practice of the Tribunal, I will not read out the text of the Appeal Judgement, except for the disposition, but instead will summarise the essential issues on appeal and the central findings of the Appeals Chamber. This oral summary does not constitute any part of the official and authoritative judgement of the Appeals Chamber, which is rendered in writing and will be distributed to the parties at the close of this hearing.

¹ URL:http://www.icty.org/x/cases/gotovina/acjug/en/121116_summary.pdf, pristup 11.2.2013.

Background of the Case

This case concerns events that occurred from at least July 1995 to about 30 September 1995 in the Krajina region of Croatia. During this period, Croatian leaders and officials initiated “Operation Storm”, a military action aiming to take control of territory in the Krajina region.

During the period relevant to the Indictment, Mr. Gotovina was a Colonel General in the Croatian Army or “HV”, the commander of the HV’s Split Military District, and the overall operational commander of Operation Storm in the southern portion of the Krajina region. The Trial Chamber concluded that Mr. Gotovina shared the objective of and significantly contributed to a Joint Criminal Enterprise, or “JCE”, whose common purpose was to permanently remove the Serb civilian population from the Krajina region, by ordering unlawful artillery attacks on Knin, Benkovac, and Obrovac and by failing to make a serious effort to prevent or investigate crimes committed by his subordinates against Serb civilians in the Krajina. The Trial Chamber found Mr. Gotovina guilty, pursuant to both the first and third forms of JCE, of crimes against humanity and of violations of the laws or customs of war. He was sentenced to 24 years of imprisonment.

During the period relevant to the Indictment, Mr. Markač was the Assistant Minister of the Interior and Operation Commander of the Special Police in Croatia. The Trial Chamber found that Mr. Markač shared the objective of and significantly contributed to a JCE, whose common purpose was to permanently remove the Serb civilian population from the Krajina region, by ordering an unlawful artillery attack on Gračac and by creating a climate of impunity through his failure to prevent, investigate, or punish crimes committed by members of the Special Police against Serb civilians. The Trial Chamber found Mr. Markač guilty, pursuant to the first and third forms of JCE, of crimes against humanity and violations of the laws or customs of war. He was sentenced to 18 years of imprisonment.

The Trial Chamber acquitted the third Accused, Ivan Čermak, of all charges against him.

Mr. Gotovina submitted four grounds of appeal and Mr. Markač submitted eight grounds of appeal. Both of the Appellants challenge their convictions in their entirety. Mr.

Markač also challenges his sentence. The Appeals Chamber now turns to the Appellants' contentions, addressing first their submissions regarding unlawful artillery attacks and the existence of a JCE.

Grounds of appeal

Unlawful Artillery Attacks and Existence of a JCE

Mr. Gotovina, in his First and Third Grounds of Appeal, and Mr. Markač, in his First and Second Grounds of Appeal, in part, submit that the artillery attacks on Knin, Benkovac, Obrovac, and Gračac, or the "Four Towns", were not unlawful and that without a finding that the artillery attacks were unlawful, the Trial Chamber's conclusion that a JCE existed cannot be sustained.

The Prosecution responds that the Trial Chamber did not err in finding either that unlawful artillery attacks against the Four Towns took place or that a JCE existed.

The Appeals Chamber recalls that the Trial Chamber concluded that the Appellants were members of a JCE whose common purpose was to permanently remove Serb civilians from the Krajina by force or threat of force. The Trial Chamber's conclusion that a JCE existed was based on its overall assessment of several mutually-reinforcing findings. The Appeals Chamber, Judge Agius and Judge Pocar dissenting, considers that the touchstone of the Trial Chamber's analysis concerning the existence of a JCE was its conclusion that unlawful artillery attacks targeted civilians and civilian objects in the Four Towns, and that these unlawful attacks caused the deportation of large numbers of civilians from the Krajina region.

The Trial Chamber's finding that the artillery attacks on the Four Towns were unlawful was heavily premised on its analysis of individual impact sites within the Four Towns, which I will refer to as the "Impact Analysis". This Impact Analysis was in turn based on the Trial Chamber's finding a 200 metre range of error for artillery projectiles fired at the Four Towns, which I will refer to as the "200 Metre Standard". Based on this range of error, the Trial Chamber found that all impact sites located more than 200 metres from a target it deemed legitimate served as evidence of an unlawful artillery attack. In identifying legitimate targets, the

Trial Chamber took into account, in part, its finding that the HV could not identify targets of opportunity, such as moving police or military vehicles, in the Four Towns.

The Appeals Chamber unanimously holds that the Trial Chamber erred in deriving the 200 Metre Standard. The Trial Judgement contains no indication that any evidence considered by the Trial Chamber suggested a 200 metre margin of error, and it is devoid of any specific reasoning as to how the Trial Chamber derived this margin of error. The Trial Chamber considered evidence from expert witnesses who testified as to factors, such as wind speed and air temperature, that could cause variations in the accuracy of the weapons used by the HV against the Four Towns, and the Trial Chamber explicitly noted that it had not received sufficient evidence to make findings about these factors with respect to each of the Four Towns. In its Impact Analysis, however, the Trial Chamber applied the 200 Metre Standard uniformly to all impact sites in each of the Four Towns.

In these circumstances, the Appeals Chamber is unanimous in finding that the Trial Chamber erred in adopting a margin of error that was not linked to the evidence it received.

With respect to targets of opportunity in the Four Towns, the Appeals Chamber holds that the Trial Chamber did not err in determining that the HV had no ability to strike targets of opportunity in the towns of Benkovac, Gračac, and Obrovac. However, the Appeals Chamber notes that the Trial Chamber was presented with, and did not clearly discount, evidence of targets of opportunity in the town of Knin. In this context, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, holds that the Trial Chamber erred in concluding that attacks on Knin were not aimed at targets of opportunity.

The Appeals Chamber, Judge Agius and Judge Pocar dissenting, recalls that, while the Trial Chamber considered a number of factors in assessing whether particular shells were aimed at lawful military targets, the distance between a given impact site and the nearest identified artillery target was the cornerstone and organising principle of the Trial Chamber's Impact Analysis. The Appeals Chamber, Judge Agius and Judge Pocar dissenting, holds that the Trial Chamber's errors with respect to the 200 Metre Standard and targets of opportunity are sufficiently serious that the conclusions of the Impact Analysis cannot be sustained.

Although the Trial Chamber considered additional evidence in finding that the attacks on the Four Towns were unlawful, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, holds that, absent the Impact Analysis, this remaining evidence is insufficient to support a finding that the artillery attacks on the Four Towns were unlawful.

In view of the foregoing, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, finds that no reasonable trial chamber could conclude beyond reasonable doubt that the Four Towns were subject to unlawful artillery attacks. Accordingly, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, grants Mr. Gotovina's First Ground of Appeal, in part, and Mr. Markač's Second Ground of Appeal, in part, and reverses the Trial Chamber's finding that the artillery attacks on the Four Towns were unlawful.

With respect to liability via JCE, the Appeals Chamber observes that the Trial Chamber's conclusion that a JCE existed was based on its overall assessment of several mutually-reinforcing findings, but the Appeals Chamber, Judge Agius and Judge Pocar dissenting, considers that the Trial Chamber's findings on the JCE's core common purpose of forcibly removing Serb civilians from the Krajina rested primarily on the existence of unlawful artillery attacks against civilians and civilian objects in the Four Towns. While the Trial Chamber also considered evidence concerning the planning and aftermath of the artillery attacks to support its finding that a JCE existed, it explicitly considered this evidence in light of its conclusion that the attacks on the Four Towns were unlawful. Furthermore, the Trial Chamber did not find that either of the Appellants was directly implicated in Croatia's adoption of discriminatory policies.

In these circumstances, having reversed the Trial Chamber's finding that artillery attacks on the Four Towns were unlawful, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, considers that no reasonable trial chamber could conclude that the only reasonable interpretation of the circumstantial evidence on the record was the existence of a JCE with the common purpose of permanently removing the Serb population from the Krajina by force or threat of force.

In view of the foregoing, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, grants Mr. Gotovina's First and Third Grounds of Appeal and Mr. Markač's First and Second

Grounds of Appeal, in part, and reverses the Trial Chamber's finding that a JCE existed to permanently remove the Serb civilian population from the Krajina by force or threat of force. It is therefore unnecessary to address the Appellants' remaining contentions regarding the JCE's existence. The Appeals Chamber notes that all of the Appellants' convictions were entered pursuant to the mode of liability of JCE. All of the Appellants' convictions are therefore reversed.

Convictions Under Alternate Modes of Liability

Having quashed, Judge Agius and Judge Pocar dissenting, the Appellants' convictions, all of which were entered pursuant to the mode of liability of JCE, the Appeals Chamber now considers the submissions of the parties regarding the possibility of entering convictions under alternate modes of liability. The Appeals Chamber recalls that, in its Order for Additional Briefing of 20 July 2012, it determined that aiding and abetting and superior responsibility are the alternate modes of liability most relevant to the Trial Chamber's findings.

The Appellants challenge the Appeals Chamber's jurisdiction to enter convictions under alternate modes of liability, and assert that, in any event, the Prosecution waived its right to seek convictions under alternate modes of liability because it did not appeal the Trial Judgement.

The Appeals Chamber observes, Judge Pocar dissenting, that it has, on multiple occasions, entered convictions on the basis of alternate modes of liability. In this respect, the Appeals Chamber notes that Article 25(2) of the Statute, specifically the power it vests in the Appeals Chamber to "revise" a decision taken by a trial chamber, grants the Appeals Chamber's authority to enter convictions on the basis of alternate modes of liability.

The Appeals Chamber, Judge Pocar dissenting, is not convinced that the Appellants have presented cogent reasons requiring departure from its practice of entering convictions on the basis of alternate forms of liability in certain circumstances. The Appeals Chamber notes, however, that it will not enter convictions under alternate modes of liability where this would substantially compromise

the fair trial rights of appellants or exceed its jurisdiction as delineated in the Statute.

In considering whether to enter convictions pursuant to alternate modes of liability in this case, the Appeals Chamber will assess the Trial Chamber's findings and other evidence on the record *de novo*. The Appeals Chamber recalls that the Trial Chamber's analysis was focused on whether particular findings were sufficient to enter convictions pursuant to JCE as a mode of liability. Accordingly, the Appeals Chamber will consider, but will not defer to, the Trial Chamber's relevant analysis.

Turning first to the Appellants' liability for the artillery attacks on the Four Towns, the Appeals Chamber recalls that it has reversed, Judge Agius and Judge Pocar dissenting, the Trial Chamber's finding that the artillery attacks on the Four Towns were unlawful. The Appeals Chamber recalls the Trial Chamber's determination that in the context of the specific factual circumstances before it, it would not characterise civilian departures from towns and villages subject to lawful artillery attacks as deportation, nor could it find that those involved in launching lawful artillery attacks had the intent to forcibly displace civilians. In these factual circumstances, the Trial Chamber's reasoning would preclude finding that departures from the Four Towns concurrent with lawful artillery attacks constituted deportation. Having assessed the evidence, the Appeals Chamber agrees with the relevant analysis of the Trial Chamber, and finds that in the factual context of this case, departures of civilians concurrent with lawful artillery attacks cannot be qualified as deportation.

The Appeals Chamber further observes that given its reversal of the finding that a JCE existed and absent a finding of unlawful attacks, the Trial Judgement does not include any explicit alternative findings setting out the requisite *mens rea* for deportation which could be ascribed to the Appellants on the basis of lawful artillery attacks. In these circumstances, the Appeals Chamber is not satisfied that the artillery attacks the Appellants were responsible for are sufficient to prove them guilty beyond reasonable doubt for deportation under any alternate mode of liability pled in the Indictment.

Turning to Mr. Gotovina's potential responsibility under alternate modes of liability based on additional findings of

the Trial Chamber, the Appeals Chamber recalls that, in addition to its findings regarding the artillery attacks on the Four Towns, the Trial Chamber found: that Mr. Gotovina was aware of crimes allegedly being committed in the Four Towns before and after the artillery attacks; that these crimes required investigation; and that Mr. Gotovina failed to follow up on the crimes. Moreover, the Trial Chamber specifically noted three “additional measures” that Mr. Gotovina could have taken, namely contacting and seeking assistance from “relevant people”; making public statements; and diverting “available capacities” towards following up on these crimes. The Trial Chamber concluded that Mr. Gotovina failed to make a serious effort to investigate the crimes and to prevent future crimes. The Appeals Chamber observes that the Trial Chamber relied on its finding of the unlawfulness of artillery attacks in assessing Mr. Gotovina’s responsibility for additional conduct and failure to act.

However, the Appeals Chamber, Judge Agius dissenting, considers that the Trial Chamber’s description of the additional measures that Mr. Gotovina should have taken was terse and vague, and it failed to specifically identify how these measures would have addressed Mr. Gotovina’s perceived shortcomings in following up on crimes. The Appeals Chamber recalls that the Trial Chamber explicitly considered evidence that Mr. Gotovina adopted numerous measures to prevent and minimise crimes and general disorder among the HV troops under his control. The Appeals Chamber further recalls that expert testimony at trial indicated that Mr. Gotovina took all necessary and reasonable measures to maintain order among his subordinates. In this context, the Appeals Chamber, Judge Agius dissenting, considers that the evidence on the record does not prove beyond reasonable doubt that any failure to act on Mr. Gotovina’s part was so extensive as to give rise to criminal liability pursuant to aiding and abetting or superior responsibility.

In this context, the Appeals Chamber, Judge Agius dissenting, can identify no remaining Trial Chamber findings that would constitute the *actus reus* supporting a conviction pursuant to an alternate mode of liability. Accordingly, the Appeals Chamber, Judge Agius dissenting, will not enter convictions against Mr. Gotovina on the basis of alternate modes of liability.

Turning to Mr. Markač's potential responsibility under alternate modes of liability based on Trial Chamber findings which have not been reversed, the Appeals Chamber recalls that the Trial Chamber found that Mr. Markač failed to order investigations of alleged criminal acts committed by members of the Special Police. The Trial Chamber concluded that, through this failure to act, Mr. Markač created a climate of impunity among members of the Special Police, which encouraged subsequent crimes committed by the Special Police, including murder and destruction of property.

The Appeals Chamber notes that the Trial Chamber did not explicitly find that Mr. Markač made a substantial contribution to relevant crimes committed by the Special Police or that he possessed effective control over the Special Police. Moreover the Appeals Chamber, Judge Agius and Judge Pocar dissenting, considers that all of the Trial Chamber's findings on Mr. Markač's culpability were made in the context of its finding of unlawful artillery attacks on the Four Towns.

Consequently, the Appeals Chamber finds that the Trial Chamber did not make findings sufficient, on their face, to enter convictions against Mr. Markač on the basis of either aiding and abetting or superior responsibility. In the absence of such findings, and considering the circumstances of this case, the Appeals Chamber, Judge Agius dissenting, declines to assess the Trial Chamber's remaining findings and evidence on the record. Doing so would require the Appeals Chamber to engage in excessive fact finding and weighing of the evidence. The Appeals Chamber, Judge Agius and Judge Pocar dissenting, recalls that the existence of a JCE and unlawful artillery attacks underpin all of the material findings of the Trial Judgement. In this context, any attempt to derive inferences required for convictions under alternate modes of liability would risk substantially compromising Mr. Markač's fair trial rights.

In light of the above, the Appeals Chamber, Judge Agius dissenting, will not enter convictions against Mr. Markač on the basis of alternate modes of liability.

Disposition

I shall now read out the full operative text of the Appeals Chamber's disposition. Mr. Gotovina and Mr. Markač, will you please stand.

For the foregoing reasons, THE APPEALS CHAMBER,

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the hearing of 14 May 2012;

SITTING in open session;

GRANTS, Judge Agius and Judge Pocar dissenting, Ante Gotovina's First Ground of Appeal and Third Ground of Appeal, in part; REVERSES, Judge Agius and Judge Pocar dissenting, Ante Gotovina's convictions for persecution, deportation, murder, and inhumane acts as crimes against humanity, and of plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war; and ENTERS, Judge Agius and Judge Pocar dissenting, a verdict of acquittal under Counts 1, 2, 4, 5, 6, 7, 8, and 9 of the Indictment;

DISMISSES, Judge Agius and Judge Pocar dissenting, as moot Ante Gotovina's remaining grounds of appeal;

GRANTS, Judge Agius and Judge Pocar dissenting, Mladen Markač's First and Second Grounds of Appeal, in part; REVERSES, Judge Agius and Judge Pocar dissenting, Mladen Markač's convictions for persecution, deportation, murder, and inhumane acts as crimes against humanity, and of plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war; and ENTERS, Judge Agius and Judge Pocar dissenting, a verdict of acquittal under Counts 1, 2, 4, 5, 6, 7, 8, and 9 of the Indictment;

DISMISSES, Judge Agius and Judge Pocar dissenting, as moot Mladen Markač's remaining grounds of appeal;

ORDERS in accordance with Rules 99(A) and 107 of the Rules, the immediate release of Ante Gotovina and Mladen Markač, and DIRECTS the Registrar to make the necessary arrangements.

Judge Theodor Meron appends a separate opinion.

Judge Carmel Agius appends a dissenting opinion.

Judge Patrick Robinson appends a separate opinion.

Judge Fausto Pocar appends a dissenting opinion.

Mr. Gotovina and Mr. Markač, you may be seated.

This hearing of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stands adjourned.